

RECEIVED
U.S. MARSHAL
MILLS, MINN.
MAY 27 5 33 PM '87

Criminal No. #87-0551 FEB

v.

Defendant.

WRIT OF HABEAS CORPUS
AD PROSEQUENDUM

We command that you have the body of Terry Jon Martin

_____ under safe and secure conduct before
the United States District Court for the District of Minnesota at
Minneapolis, Minnesota, on the 26th day of May.

thereafter as may be necessary, for the purpose of _____

Initial Appearance and from time to time thereafter for

NOV 09 1987
FILED
FRANCIS E. DOSAL, CLERK
DEPUTY CLERK'S INITIALS

I HEREBY CERTIFY AND RETURN THAT I HAVE RECEIVED THIS WARRANT AT PART, ON THE
1ST DAY OF JUNE 1987 BY TAKING CUSTODY OF THE WITHIN-NAMED
JERRY LON MARTIN AT HENN CNTY JAIL
 AND TRANSPORTED HIM TO U.S. DISTRICT COURT WHERE HE
 WAS COMMITTED INTO THE CUSTODY OF U.S. MARSHAL
 ON THE 1ST DAY OF JUNE 1987.

Robt L. PAULK SR
 UNITED STATES MARSHAL
William Wenzel
 DEPUTY

I HEREBY CERTIFY AND RETURN THAT I HAVE RECEIVED THIS WARRANT AT PART, ON THE
5th DAY OF June 1987 BY TAKING CUSTODY OF THE WITHIN-NAMED
Terry Jon Martin AT Henn. Co. Jail
 AND TRANSPORTED HIM TO U.S. Clerk of Courts to Post Fed. Bond + returned to Hennco. Jail WHERE HE
 WAS COMMITTED INTO THE CUSTODY OF Henn Co. Sheriff
 ON THE 5th DAY OF June 1987.

Robert L. PAULK SR.
 UNITED STATES MARSHAL
Charles K. Sney
 DEPUTY

U. S. MARSHAL'S RETURN

I HEREBY CERTIFY AND RETURN THAT I HAVE RECEIVED THIS WARRANT AT PART, ON THE
 _____ DAY OF _____ 19____ BY TAKING CUSTODY OF THE WITHIN-NAMED
 _____ AT _____
 AND TRANSPORTED HIM TO _____ WHERE HE
 WAS COMMITTED INTO THE CUSTODY OF _____
 ON THE _____ DAY OF _____ 19____.

UNITED STATES MARSHAL
 DEPUTY

FILED
 FRANK J. JACKSON

further proceedings in said matter, and upon conclusion thereof to return said defendant to the custody from which he (she) came under safe and secure conduct in accordance with the law and have you then this WRIT.

WITNESS: The Honorable Floyd E. Boline
~~Judge~~ ~~on~~ Magistrate of said Court, and
the Seal of said Court, hereunto
affixed at Minneapolis, MN
in said district this 27th
day of May, 19 87,
on duplicate originals hereof.

FRANCIS E. DOSAL, Clerk

BY:

Judith C. Palmer
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

United States of America, CASE NO. FEB 87-0551
Plaintiff,
vs. DATE: June 1, 1987
Terry Jon Martin,
Defendant. MINNEAPOLIS, MN

TRANSCRIPT OF PROCEEDINGS

BEFORE U. S. MAGISTRATE FLOYD E. BOLINE

APPEARANCES:

For Plaintiff: DOUGLAS PETERSON, Asst. U. S. Atty.

For Defendant: JAMES D. O'CONNOR, Esq.

FILED JUL 01 1987
FRANCIS E. DOSAL CLERK
BY *[Signature]* DEPUTY

I N D E X

WITNESSES

	Direct	Cross	Redirect	Recross
W. Powers	3	14,		
		38		
D. Carlton	24	28	37	
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June 1, 1987

THE COURT: We are here this afternoon on a preliminary hearing and a detention hearing.

Is the defendant present in court?

MR. O'CONNOR: Yes, Your Honor.

THE COURT: Why don't counsel state your name and who you are representing so that will appear on the record?

MR. O'CONNOR: I am James O'Connor, Your Honor, with Faegre and Benson, representing the defendant, Terry Jon Martin.

MR. PETERSON: Douglas R. Peterson, for the government.

THE COURT: Is the government ready to proceed, Mr. Peterson?

MR. PETERSON: It is, Your Honor. The government has three witnesses this afternoon, the first of those being Walt Powers.

WALTER J. POWERS

Being duly sworn, testified as follows:

DIRECT EXAMINATION

THE CLERK: State your name and spell your last name.

A Walter J. Powers, P-o-w-e-r-s.

MR. PETERSON:

Q Mr. Powers, what do you do for a living?

A I am a detective with the Hennepin County Sheriff's

1 Department.

2 Q How long have you been with the sheriff's department?

3 A About seventeen and a half years.

4 Q And has your work included criminal investigation
5 experience?

6 A Yes, it has.

7 Q How many years of that?

8 A About five and a half years in criminal
9 investigations, and three years in undercover narcotics.

10 Q Are you familiar with Terry Jon Martin?

11 A Yes, I am.

12 Q If Mr. Martin is present in the courtroom, please
13 identify him for the court.

14 A He's the man seated at the counsel table behind you,
15 wearing the blue vee-neck pullover shirt, reddish hair,
16 and a beard, light beard.

17 MR. PETERSON: May the record reflect the witness has
18 identified the defendant?

19 THE COURT: The record so reflects.

20 MR. PETERSON:

21 Q How is it that you know Mr. Martin?

22 A I arrested Mr. Martin in February of 1986, and have
23 seen him in a number of instances since then.

24 Q For what did you arrest him in February of 1986?

25 A Receiving or concealing stolen property.

1 Q Has that matter been disposed of?

2 A No, it hasn't (shakes head in a negative manner).

3 Q The charges are still pending?

4 A They are -- in state court.

5 Q Which division of state court?

6 A Hennepin County District Court.

7 Q Have you recently received some reports regarding Mr.
8 Martin?

9 A Yes, I have.

10 Q On what dates?

11 A On May 20, 1987 I received a teletype from the chief
12 of police in Frazee, Minnesota -- this was about 8:15 in
13 the morning, while I was preparing to go to court on Mr.
14 Martin's trial, that was scheduled for 9:00 o'clock that
15 morning in Hennepin County District Court.

16 Q Who is the person that sent that report?

17 A The teletype came from a Kelly Shannon, who was the
18 chief of police in Frazee, Minnesota.

19 Q What information was provided by the teletype?

20 A The teletype itself said that the chief of police was
21 looking for any additional information concerning Mr.
22 Martin, and two associates that were with him, in the
23 early morning hours of the 20th, up in Frazee.

24 The teletype indicated that the chief thought that he
25 had possibly broken up a drugstore burglary attempt.

1 Q What did you do, after receiving that teletype?

2 A I called the chief of police up in Frazee.

3 Q What information did he give you?

4 A He reiterated what he had said in his teletype,
5 indicated that he had patted down Mr. Martin and Mr.
6 Emerson at the scene, described a coat, that Mr. Martin
7 was wearing, as a blue parka with plaid lining; and it
8 had -- in the chief's words -- a funny pocket sewn on the
9 inside of the coat.

10 I asked him if it could possibly have been a
11 "booster" coat, and he didn't know what a booster coat
12 was, but he described it again, and it sounded as if it
13 could be what is commonly referred to as a booster or a
14 shoplifting coat.

15 Q What do you mean by a booster or shoplifting coat?

16 A It is a coat that has a special lining sewn into it
17 to facilitate shoplifting.

18 People wear this when they go into a store, and then
19 they use the concealed pockets to hide merchandise that
20 they steal from the stores.

21 Q What other information did Chief Shannon provide you
22 at that time?

23 A Chief Shanon indicated that he had asked Mr. Martin
24 if he could inspect the trunk of the vehicle, and Mr.
25 Martin opened the trunk for him. And he said he could

1 observe tools -- including a long pry bar type tool, and
2 he said he also had some vise grips and other tools. And
3 in the teletype he had said these are the types of tools
4 used from break-ins.

5 Q Based on your experience, what was the significance
6 of those tools?

7 A The significance was, with Mr. Martin's record --
8 which I was aware of at the time -- in possession of those
9 tools, it would constitute possession of burglary tools
10 for Mr. Martin.

11 Q Did you receive any other reports concerning Mr.
12 Martin around the 20th of May?

13 A Yes. The following day I received a report from
14 Deputy Stingline of the Hennepin County Sheriff's Patrol
15 Division, who indicated that on the evening of May 19,
16 1987, Mr. Martin was observed by the manager of a Union 76
17 gas station in Rogers.

18 At that time this individual concealed 10 to 12 tee
19 shirts in a coat described as a dark blue parka.

20 And when he was approached by the manager, this
21 individual threw the tee shirts down and exited the store
22 and entered a vehicle described as a dark blue Cadillac,
23 and it had license plates on it that registered to Mr.
24 Martin.

25 Q Who checked those license plates?

1 A They were checked by the deputy that sent in the
2 report. And I also had checked the license number
3 provided by the chief up at Frazee, as the vehicle that
4 Mr. Martin and these other individuals were in, in the
5 early morning hours of the 20th.

6 Q What did you do, after receiving these reports on the
7 20th and 21st of May?

8 A I attempted to find Mr. Martin and his vehicle, with
9 the idea of impounding the vehicle and obtaining a search
10 warrant, and searching for the booster coat and burglary
11 tools.

12 Q Did you obtain a search warrant?

13 A I did obtain a search warrant the early morning of
14 the 22nd, and then I --

15 Q Before you go on --

16 A Go ahead.

17 Q From whom did you obtain that warrant?

18 A Judge Michael Davis of the Hennepin County District
19 Court signed the warrant.

20 Q And you executed that warrant?

21 A Yes, I executed the warrant, with the assistance of
22 several other deputies, just outside of this building on
23 the early morning of -- well, the late morning, I should
24 say, of the 22nd of May.

25 Q What was found?

1 A We found the booster coat that was described by the
2 chief of police up in Frazee and by the manager of the
3 Union gas station, Union 76 gas station.

4 We found the burglary tools -- or the tools that were
5 described by the chief of police in Frazee.

6 And we also found some rather sophisticated burglary
7 tools concealed in the back of the vehicle, with 800
8 tablets of Ritalin.

9 Q What is Ritalin?

10 A Ritalin is a Schedule Two controlled substance. It
11 is an amphetamine-type stimulant that is commonly used to
12 treat hyperactive children.

13 For some reason, amphetamines work the opposite on
14 hyperactive children, and slow them down.

15 But on adults, it would act much as an amphetamine.
16 It would be a stimulant.

17 Q Have those tablets been analyzed by anyone?

18 A They were turned over to the city chemist for
19 analysis. She examined them and compared them with a
20 Physician's Desk Reference book that she has, and stated
21 that -- in her opinion -- they were pharmaceutical
22 Ritalin, and that she would conduct infrared and other
23 chemical tests, to make sure that they were.

24 I haven't heard the results of those chemical tests
25 as of right now.

1 Q So that conclusion was based on her observation, and
2 not on any tests that she conducted.

3 Is that right?

4 A That's correct.

5 Q Based on your experience, are you familiar with the
6 quantities of Ritalin that would be typical of
7 distribution, as opposed to use?

8 A 800 tablets would be a quantity for distribution,
9 rather than for personal use.

10 Q Have you received any information as to how Mr.
11 Martin obtained those tablets?

12 A I learned that there had been a drugstore burglary on
13 May 15 at the Snyder Drug Store located in New Hope,
14 Minnesota; and that, during that burglary, Ritalin was
15 taken -- along with quite a variety of other drugs.

16 The New Hope Police Department investigated a
17 complaint of the burglary, and of spotting a car in the
18 parking lot the day before -- and the druggist felt that
19 they were being cased at that time; this would have been
20 on the 15th -- the burglary actually occurred on the 16th,
21 and it was reported to the police on the 17th of May.

22 Q Who provided you with all this information?

23 A The New Hope Police Department.

24 Q And did they provide you with any information
25 regarding Mr. Martin?

1 A Yes. They indicated that an individual had been
2 traced, through a license number, and this person was
3 identified as Fred King, and he stated that he was in the
4 company of a man by the name of John Emerson and an
5 individual known as Terry -- the last name was something
6 other than Martin -- but he gave a physical description
7 which matched very closely to Mr. Martin. And --

8 Q Now you are testifying about information that Mr.
9 Fred King gave to whom?

10 A The New Hope Police Department. I have a copy of his
11 statement.

12 In that statement he indicated that he had been with
13 Mr. Emerson and this Terry the day before, at the drug
14 store in New Hope, where Mr. Emerson and Terry had gone
15 inside to case the drugstore with the idea of burglarizing
16 it.

17 Mr. King stated that, the following day, he was told
18 that they were going to go and burglarize that drugstore
19 in the evening.

20 Mr. King indicated that he drove to the drug store at
21 about 8:00 o'clock in the evening, and he observed Mr.
22 Emerson seated in a vehicle parked in the parking lot.

23 And he described that vehicle as a dark blue, older
24 Cadillac.

25 He asked Mr. Emerson if they were going to do it, and

1 Mr. Emerson stated that "Terry's inside doing it right
2 now."

3 King went inside the drug store just to see what was
4 going on; didn't see anything; left; and received a call a
5 little later, from Mr. Emerson, who told him that they had
6 been quite successful, and listed several drugs that they
7 had taken -- including a large quantity of Ritalin -- and
8 agreed to meet Mr. King and give him something for driving
9 them around the day before.

10 But when Mr. King met at the prearranged time,
11 Emerson and this Terry didn't show up.

12 Q As part of the police investigation, were any checks
13 made with the Snyder's Drug Store in that Midland Shopping
14 area?

15 A Yes.

16 Q What were the results of that investigation?

17 A The Midland -- or the Snyder Drug Store supplied the
18 police department with a list of drugs that were taken,
19 including the Ritalin.

20 There were four different dosage units taken of
21 Ritalin.

22 And the dosage -- there were four different dosage
23 units of Ritalin taken from Mr. Martin's car during the
24 execution of the search warrant, on the 22nd. The number
25 of Ritalin that were taken, that were reported taken

1 during the drug store burglary were exactly double of
2 what Mr. Martin had in his possession. So Mr. Martin had
3 half of the Ritalin that had been taken in that drug store
4 burglary.

5 Q Are any state charges pending, as a result of your
6 execution of the search warrant on -- I believe it was --
7 the 22nd of May 1987?

8 A Yes.

9 Q What charges are pending?

10 A Possession of shoplifting gear, which is a felony;
11 possession of burglary tools, which is also a felony; and
12 possession with intent to distribute a Schedule Two
13 controlled substance -- the Ritalin.

14 Q Has anyone else been arrested besides Mr. Martin?

15 A Not in conjunction with the execution of that search
16 warrant.

17 Q Have any statements been taken from Mr. Emerson?

18 A Yes.

19 Mr. Emerson was arrested, but not in conjunction with
20 the search warrant conducted on Mr. Martin's car.

21 He was arrested Friday; and, after being advised of
22 his rights per Miranda, admitted that he was with Mr.
23 Martin, outside the drugstore, on the 15th; denies any
24 involvement in a burglary; but indicated that they were
25 with Mr. King the day before the burglary. He also --

1 Q Did he provide you any statements, regarding Mr.
2 Martin, other than those you have just testified to?

3 A Yes. He said that he thought that Mr. Martin was
4 preparing to flee because he didn't want to appear in
5 state court on the receiving and concealing stolen
6 property charges.

7 MR. PETERSON: I have no further question of this
8 witness.

9 THE COURT: You may cross examine.

10 CROSS EXAMINATION

11 MR. O'CONNOR:

12 Q If I understand your testimony correctly, you seized
13 the Ritalin pursuant to a warrant that was issued by Judge
14 Michael Davis.

15 Is that correct?

16 A That's correct.

17 Q And that warrant authorized you simply to find a blue
18 coat and burglary tools?

19 A That's correct.

20 Q Did the warrant authorize you to open up Mr. Martin's
21 vehicle, the trunk?

22 A Did it authorize me to open his trunk?

23 Q Right.

24 A It authorized me to search the vehicle.

25 Q And I take it -- did you search the trunk?

1 A I searched the trunk, yes.

2 Q Where did you find the blue coat?

3 A I found that in the, directly behind the driver's
4 seat, partially on the floor and partially on the seat.

5 Q Where did you find the vise grips and the pry bar?

6 A I believe the pliers and the plier-type tools were
7 found in the trunk, and the pry bar.

8 Q Where was the Ritalin found?

9 A The Ritalin was found under an ash tray that -- the
10 screws had to be removed from the back seat of the car,
11 and the Ritalin was in a bag.

12 With this bag were two other plastic bags containing
13 very sophisticated lock-picking --

14 Q Let me slow you down there; do it one at a time.

15 A Okay.

16 Q You get into the car and, I take it -- what did you
17 search first? The back seat?

18 MR. PETERSON: Your Honor, I'm going to object to
19 this line of questioning. I don't mind if some general
20 questions are asked in this regard; but extensive
21 questioning -- in this area -- is irrelevant to this
22 proceeding.

23 MR. O'CONNOR: Your Honor, I don't think I am asking
24 for extensive discovery at this point. All of this
25 relates to the search warrant that he was executing at the

1 time.

2 THE COURT: Are you contesting the fact that he could
3 search any part of the car that he wanted to? Is that
4 your point?

5 MR. O'CONNOR: No. I'm suggesting, Your Honor, that
6 he had the authority to search for the burglary tools and
7 the blue coat. Now I am trying to determine where in fact
8 the Ritalin was discovered. It's the --

9 MR. PETERSON: Go ahead. Why don't you ask the
10 question again? I think we lost track of what it was.

11 THE COURT: Mr. Reporter, would you read the question
12 back?

13 (Question read)

14 MR. O'CONNOR:

15 Q What I am getting at is: What did you search first?
16 What part of the car?

17 A I would say we searched the trunk first.

18 Q And, again, you were looking for the blue coat and
19 the burglary tools and, specifically, you were looking for
20 the pry bar and the vise grips.

21 Is that correct?

22 A I was looking for burglary tools including, but not
23 limited to, those; yes.

24 Q Is it fair to say that the only burglary tools -- or
25 the only tools that you were told about were the pry bar

1 and the vise grip or the pliers that you described
2 earlier?

3 A That's correct.

4 Q Do you understand or have you heard that Mr. Martin
5 works with his brother as a carpenter?

6 A Have I heard that?

7 Q Yes.

8 A I have heard that he -- I don't believe that I have
9 heard he works with his brother as a carpenter. I have
10 heard he works as a carpenter for a construction company.

11 Q Okay. So you open up the trunk first. What did you
12 find in the trunk?

13 A Well, there were several suitcases, the soft-leather
14 sided types of suitcases.

15 Q What did you find in them?

16 A Well, there was some narcotics paraphernalia,
17 injection equipment. There was a couple traffic citations
18 to Mr. Martin. There were other letters addressed to Mr.
19 Martin, in the suitcases. Clothes.

20 Q Is that about it?

21 A I guess -- that's being very broad, but there were a
22 lot of things in the suitcase -- there were several
23 suitcases.

24 There was some makeup, some toiletries, shaving
25 equipment.

1 Q With respect to what you have described as narcotics
2 paraphernalia, what was that located in?

3 A It was in a suitcase.

4 Q Was it located within something within the suitcase?

5 A I would say yes, but I don't recall exactly if it was
6 like a shaving kit or something like that, I don't recall.
7 It was in something in one of the suitcases.

8 Q Okay. After you searched the trunk, then where did
9 you go?

10 A The interior of the car.

11 Q And I take it the blue coat was --

12 A I knew that the blue coat was there.

13 Q You could see it?

14 A Right. When we opened up the passenger's -- or the
15 driver's side of the car, you could see the blue coat.

16 Q And there wasn't anything in the blue coat, I take
17 it?

18 A Driver's license.

19 Q Okay. Other than that, that was about it?

20 A That was it.

21 Q Did you already tell me that you found the pry bar
22 and the pliers in the back trunk?

23 A Yes.

24 Q You didn't find any other ostensible burglary
25 equipment in the trunk, other than that?

1 A Oh yes.

2 Q What else?

3 A Quite a bit.

4 Q What else?

5 A There were pliers, there were portable drills, there
6 were punches, gloves, police scanners; quite a variety of
7 what I would classify as burglary tools.

8 Q Okay. You would agree, also, wouldn't you, that
9 pliers, punches, portable drills are all tools that
10 carpenters use?

11 A Yes.

12 MR. PETERSON: Objection, lack of foundation, Your
13 Honor.

14 THE COURT: That; and it is not relevant, anyway --
15 at least not relevant to this proceeding.

16 MR. O'CONNOR:

17 Q Is it fair to say that what was identified to you
18 from the chief of police, about what was seen in Mr.
19 Martin's car -- that you have described as burglary
20 tools -- are the tools that you found in the trunk?

21 Do you understand my question?

22 A I understand your question.

23 I would say that the answer to the question would be
24 "yes."

25 Q Now you were telling me that the Ritalin was located

1 underneath an ashtray?

2 A That's correct.

3 Q Can you describe to me how big this ashtray is?

4 A Oh, it's approximately 7 or 8 inches long, by 2-1/2,
5 3 inches wide.

6 Q Where was it located?

7 A In the arm rest, on the passenger's side, in the back
8 seat.

9 Q Okay. Was it one of those ash trays you can just
10 pull out and push back, in the side of car -- or in the
11 panel?

12 A It's the type --

13 MR. PETERSON: Your Honor, at this point I would
14 renew my objection to this line of questioning, as outside
15 the scope of the proceedings and more appropriate for a
16 suppression hearing.

17 THE COURT: Overruled.

18 A It's the type of ash tray where you lift up a little
19 door, and put your ashes in it.

20 The ash tray assembly was physically removed when we
21 found the items underneath it.

22 Q That's what I'm getting at. As you look at the thing
23 itself, the ashtray itself -- while it's sitting in the
24 car -- was it just a little, couple of inches in diameter,
25 the top of it that you flip up and flip down?

1 A No. The brass -- it was all contained in kind of a
2 chrome, rectangular shape, about 8 inches long, 7, 8
3 inches long, and about 2-1/2 to 3 inches wide.

4 And then there was a small portion that you'd lift
5 up, and you could see the ash tray, and there was a
6 cigarette lighter in there, also -- or about 4 cigarette
7 lighters.

8 Q Okay. Did you have to remove the entire assembly,
9 the 7-inch long assembly?

10 A Yes.

11 Q Okay. So what did you do then? What made you decide
12 to remove that?

13 A We were conducting a search, looking for burglary
14 tools.

15 Q Okay. And decided to remove the ashtray?

16 A That's right.

17 Q Tell me: What did you find in there, besides the
18 Ritalin?

19 A We found a large, I would describe as a nipper-type
20 tool. That is, it's a pincher that -- when it's closed --
21 the mouth of it only closes to about 1 inch, but when it's
22 opened it could grab ahold of anything from -- oh --
23 probably 3 or 4 inches down to an inch, and grab it
24 solidly. And it had handles on it approximately 12 inches
25 long.

1 And there were also 2 plastic bags containing lock
2 picks -- which are relatively sophisticated devices used
3 to open locks.

4 Q Do you happen to know if anybody had access to that
5 car before you searched it, other than Mr. Martin?

6 A I have no idea.

7 Q Has anybody started any criminal proceeding as a
8 result of the suggestion that somebody -- that matched Mr.
9 Martin's description -- stole tee shirts or attempted to
10 steal tee shirts out of a Union 76 station?

11 A Yes.

12 Q Who has started those criminal proceedings?

13 A I have started the investigation.

14 One of my partners showed a photo lineup to the
15 manager, I believe it was Friday -- no -- Thursday night.

16 And I've been off work, so I don't know what the
17 results of that were.

18 Q As we sit here today, you can't say that Mr. Martin
19 was in fact that person.

20 Is that fair to say?

21 A Mr. Emerson -- when I interviewed Mr. Emerson, he
22 told me that Mr. Martin got caught trying to steal some
23 tee shirts when they were on their way up to Frazee, and
24 that he was wearing a blue parka at the time.

25 Q Do you know whether or not any fingerprints were

1 recovered at the Snyder Drug Store?

2 A No, I don't.

3 Q Is it fair to say that nobody at the Snyder Drug
4 Store has been able to identify either Mr. Emerson or Mr.
5 Martin, to your knowledge?

6 A I do not know.

7 Detective Link, from New Hope, was conducting that
8 investigation.

9 Once again, I have been off work, and I'm off today,
10 and I'm not coming back until Wednesday -- at which time
11 I'll talk to various people and find out what the outcome
12 of this was.

13 So I do not know.

14 Q So as we sit here today, to your knowledge, nobody at
15 the drugstore has identified either Mr. Emerson or Mr.
16 Martin as burglars?

17 A As being at the drug store?

18 Q Right.

19 A As far as I know, no one has identified either one of
20 them.

21 Fairly detailed descriptions, however, have been given
22 of both of these people.

23 MR. O'CONNOR: I have nothing further.

24 THE COURT: Any redirect, Mr. Peterson?

25 MR. PETERSON: None, Your Honor.

1 THE COURT: You are excused, thank you.

2 MR. PETERSON: The government calls Dale Carlton.

3 DALE CARLTON

4 Being duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 THE CLERK: State your name and spell your last name.

7 A MY name is Dale L. Carlton, last name is spelled
8 C-a-r-l-t-o-n.

9 MR. PETERSON:

10 Q Mr. Carlton, what do you do for a living?

11 A A United States probation officer for the District of
12 Minnesota.

13 Q How long have you done that?

14 A Since January 1974.

15 Q And briefly, what are your duties?

16 A Basically two duties.

17 One is to write pre-sentence investigations.

18 The other is to supervise people on parole or
19 probation, as well as to do some pretrial work for people
20 on bond supervision.

21 Q As part of your work do you also obtain criminal
22 records for charged individuals?

23 A Yes.

24 Q How do you go about obtaining those records?

25 A After an initial interview with a client who's pled

1 guilty or found guilty, we do a computer check, we get
2 whatever information we can from the client, and do the
3 routine local computer checks, record checks.

4 Q Has your office had occasion to supervise Terry Jon
5 Martin?

6 A Supervise him on bond supervision, yes.

7 Q And in connection with what case has he been
8 supervised.

9 A Supervised under a case from Judge Renner's
10 courtroom. I believe it was a firearms case.

11 Q I show you what has been marked as Government Exhibit
12 1. Can you identify that document?

13 A Yes. This is an order setting conditions of release
14 for an individual who has been placed on bond.

15 MR. PETERSON: Your Honor, the government offers
16 Exhibit 1.

17 MR. O'CONNOR: No objection.

18 THE COURT: Government Exhibit 1 will be received.

19 (Govt. Exh. 1 received)

20 MR. PETERSON:

21 Q Mr. Carlton, was your office responsible for
22 supervising Mr. Martin in connection with the bond
23 conditions referenced in Exhibit 1.

24 A Yes. We supervised him from somewhere in March of
25 '87. Prior to that, he was on an unsecured bond.

1 Q Were any additional conditions ever set by the court,
2 over and above those referenced in Exhibit 1?

3 A Yes. He was supposed to report by telephone before
4 noon on every Monday and Thursday.

5 Q What is the reporting history of Mr. Martin?

6 A Very spotty.

7 The first indication in the file would be reporting
8 on March 9, 1987. From that point he failed to report on
9 the 12th and 16th of March 1987. And I contacted him --
10 or I contacted the address where he was supposed to be
11 living at in Grand Rapids, Minnesota, spoke to an
12 individual who was not Mr. Martin, and said that it was
13 important that Mr. Martin get ahold of me.

14 That was on the 18th of March, that I made the phone
15 call.

16 On the 19th, Mr. Martin called me on the phone at
17 9:30 in the morning; said that he had called in late on
18 the 16th, but he doesn't remember who he spoke to; said
19 that oftentimes he's down in the Twin Cities area, and
20 gave me -- said he was staying with a girlfriend in St.
21 Paul, and gave me a phone number there.

22 After that he called in on the 23rd of March, 26th,
23 and 30th of March. And that was the last time he called
24 in.

25 The next time I saw him was when a jury verdict was

1 returned on the 17th of April. That was my next contact
2 with him.

3 After that, the next time I had contact with him was
4 the 22nd of May.

5 Q What jury verdict came in on the 17th of April?

6 A It was another case that Mr. Martin had pending in
7 front of Judge Murphy on some narcotics charges -- of
8 which he was acquitted.

9 Q And what is the status of the case referenced in
10 Exhibit 1?

11 A That would be the firearms case in front of Judge
12 Renner, and my understanding is that it is on appeal by
13 the government to the circuit court.

14 Q As part of your work, you also had occasion to obtain
15 the criminal record of Mr. Martin?

16 A Yes.

17 THE COURT: Is that Government Exhibit 2?

18 MR. PETERSON: Government Exhibit 2.

19 Q And I will show that to the witness and ask the
20 witness to identify it.

21 A It is what is commonly referred to as an FBI Rap
22 Sheet, or a history of the convictions submitted to the
23 FBI.

24 MR. PETERSON: The government offers Exhibit 2.

25 THE COURT: Any objection?

1 MR. O'CONNOR: No objection, Your Honor.

2 THE COURT: Government Exhibit 2 will be received.

3 (Govt. Exh. 2 received).

4 MR. PETERSON:

5 Q Mr. Carlton, what felony convictions are reflected in
6 Government Exhibit 2?

7 A There are a number of felony convictions:

8 1967, aggravated assault.

9 1967, simple robbery.

10 1972, burglary, forced entry.

11 1976, burglary.

12 1977, in the State of Iowa -- the previous ones were
13 all in Minnesota -- 1977 in Iowa, burglary with
14 aggravation.

15 That appears to be the last felony listed on here.

16 MR. PETERSON: I have no further questions of this
17 witness.

18 THE COURT: You may cross examine, Mr. O'Connor.

19 CROSS EXAMINATION

20 MR. O'CONNOR:

21 Q It is fair to say then, based on what you have just
22 said, that the last felony -- that is represented on
23 Government Exhibit 2 -- is 10 years ago?

24 A Yes.

25 Q With respect to the case that was before Judge

1 Murphy, it was a drug case, was it?

2 A Yes.

3 Q Do you know -- was it a multiple count drug case, do
4 you recall?

5 A I believe it was two counts.

6 Q And the jury returned not-guilty verdicts on both
7 counts of the indictment?

8 A Yes.

9 Q And with respect to the case in front of Judge
10 Renner, it was a what?

11 A My understanding was it was a firearms case.

12 Q And is it your understanding that Judge Cudd issued a
13 report and recommendation that ruled that evidence that
14 was seized was inadmissible, which was affirmed by the
15 district court, and that is what is on appeal right now?

16 A That is my understanding.

17 Q Is it fair to say, Sir, that if you believe somebody
18 under your charge was not complying with the terms and
19 conditions of his probation or his conditional release,
20 that you could violate that person -- or attempt to
21 violate that person?

22 A I could recommend that, yes.

23 Q Okay. And I take it, based on your years of
24 experience, you only do that when you think there's a real
25 reason to do that.

1 Is that fair to say?

2 A Right.

3 Q You don't violate anybody just because he missed a
4 couple of terms or conditions under their parole -- or,
5 excuse me -- their conditional release.

6 Is that a fair statement?

7 A That's correct.

8 Q So ultimately it is a judgment call you've got to
9 make, whether or not you think somebody is complying with
10 the spirit of conditional release?

11 A Right.

12 Q And it is fair to say, isn't it, that with respect to
13 Mr. Martin, nobody from the FPO office decided to attempt
14 to violate him.

15 Is that fair to say.

16 A What is the "FPO office"?

17 Q Well, the parole office -- I'm sorry -- the parole
18 office.

19 A Yes.

20 Q No one?

21 A No.

22 Q And is it fair to say that, based on what you know,
23 Mr. Martin made every single appearance that was required
24 of him, both in front of Judge Murphy and in front of
25 Judge Renner?

1 A As far as I know.

2 Q Does your office also do investigations determining
3 bail conditions?

4 A Yes.

5 Q Okay. And is it fair to say that your office can
6 recommend to the United States Attorney's office, or
7 others, that they take a position that no bail is offered
8 or that other types of conditions are set on a release?

9 A We would make --

10 MR. PETERSON: Objection, irrelevant.

11 THE COURT: Overruled.

12 A We would make that recommendation to the judicial
13 officer.

14 MR. O'CONNOR:

15 Q Were you the person that was assigned to Mr. Martin
16 in the Judge Murphy and Judge Renner cases?

17 A I was assigned to do the presentence investigation
18 for Judge Murphy.

19 I was assigned to do the pretrial services for the
20 bail case for Judge Renner, once the conditions were
21 changed.

22 Q Okay. The deal for Judge Murphy went by the boards
23 when the jury returned a not-guilty verdict?

24 A Right. There was no bond supervision in that case.

25 Q Okay. But there could have been, though, right?

1 A There could have been.

2 Q Then your office -- if it chose to -- could have
3 desired to set certain limitations and restrictions of his
4 release pending trial.

5 Is that fair to say?

6 A We could have made that recommendation.

7 Q And you didn't; right?

8 A I didn't, no.

9 Q And neither did your office; correct?

10 A Not that I am aware of.

11 Q And is it also fair to say that Government Exhibit 2
12 was available for your office's use when your office
13 decided not to ask for any bail restrictions?

14 A Well, the office did subsequently ask for bail
15 restrictions.

16 Q Do you know whether or not -- let's slow down.

17 First of all -- let's talk about Judge Murphy's case,
18 first. They originally did not ask for any restrictions
19 with respect to release.

20 Is that fair to say?

21 A Right.

22 Q Okay. And at that time, Government Exhibit 2 was
23 available to your office.

24 Is that a fair statement?

25 A At the time of the first appearance?

1 Q Yes.

2 A Possibly. It is not probable.

3 Q It's not probable?

4 A No (shakes head in a negative manner).

5 Q Well, do you think it is probable that -- if you
6 chose to -- the United States Federal Bureau of
7 Investigation could have put together a rap sheet on Mr.
8 Martin?

9 A Oh, sure.

10 MR. PETERSON: Objection, lack of foundation,
11 irrelevant, hypothetical.

12 THE COURT: sustained.

13 MR. O'CONNOR:

14 Q The information that is contained in Exhibit 2 was
15 available to your office, when your office chose not to
16 ask for any bail restrictions before Judge Murphy
17 initially. True or false?

18 A I don't know. I didn't handle it.

19 Q Well, if you didn't handle it, you were suggesting
20 that -- later on -- there were some restrictions that were
21 asked of Mr. Martin here?

22 MR. PETERSON: Objection to the form of the question.
23 It is extremely unclear whether you are talking about the
24 Judge Renner case or the Judge Murphy case, and we are
25 slipping from one to the other. I think, in order to make

1 the record clear, you should be explicit in your question.

2 THE COURT: Sustained.

3 MR. O'CONNOR:

4 Q Regarding Judge Murphy's case, I think you suggested
5 earlier that, later on in the proceedings, your office
6 asked for certain restrictions to be imposed upon Mr.
7 Martin.

8 Did I understand that correctly?

9 A Restrictions, yes.

10 Q What were those restrictions?

11 A That he report by telephone before noon every Monday
12 and Thursday.

13 Q Okay. And those reports, did they have to come into
14 you?

15 A Yes.

16 Q Okay. And you said earlier that he missed a couple
17 of times. Right?

18 A More than a couple.

19 Q Okay. When you said that the last time he called, to
20 your knowledge, was March 30, and then you saw him again
21 on April 17 -- the date of the jury verdict -- how many
22 days in there was he supposed to report to you, do you
23 recall?

24 A If there are two days a week -- probably 4; possibly
25 5.

1 Q If he's in trial, is it fair to say that you knew
2 where he was?

3 A Sure.

4 Q So you didn't have to worry about his fleeing?

5 A Mm-hum.

6 Q Is that why you weren't so concerned about whether he
7 called in from the 30th to the 17th?

8 A That's correct.

9 Q And, again, if you were really concerned about his
10 flight, or if you were concerned about whether he would
11 pose a danger to the community, you could have asked an
12 assistant U. S. Attorney -- or others -- to petition the
13 court to impose more restrictive bail conditions?

14 MR. PETERSON: Objection; irrelevant.

15 MR. O'CONNOR:

16 Q Is that fair to say?

17 THE COURT: Overruled.

18 A Yes.

19 MR. O'CONNOR:

20 Q Let's talk about the Judge Renner case. In that case
21 you told me that it was your job to determine original bail
22 setting conditions. Did I understand that correctly?

23 A No, I had nothing to do with his bail or Judge
24 Renner's case at all.

25 Q Do you know anything about that?

1 A No.

2 Q As we sit here today, do you know whether Mr. Martin
3 was held without bail?

4 A I assume that he wasn't because he was out on --

5 Q Okay. And the only way that -- is it fair to say
6 that, based on your years of experience and what you have
7 done -- is it fair to say that, if he is out, it's because
8 the government was not successful or did not seek to have
9 him held in detention without bail?

10 A Objection, lack of foundation.

11 THE COURT: Would you read the question back, Mr.
12 Reporter?

13 (Question read)

14 THE COURT: Sustained.

15 MR. O'CONNOR:

16 Q Who was it that was responsible for putting together
17 the papers regarding the bail consideration for Mr. Martin
18 before Judge Renner?

19 A I really don't know. His initial bail -- which I
20 believe was in July of '86 -- was conducted by a probation
21 officer, I think Pam MacNulty.

22 Q Was that in your office?

23 A She was.

24 MR. O'CONNOR: That's all I have of this witness,
25 Your Honor.

1 Your Honor -- before I forget -- I neglected to ask
2 the first witness -- may I ask that he remain in the
3 courtroom until the government has finished? Then I can
4 ask him a final question.

5 THE COURT: Why don't you just ask him right now? He
6 can answer from there.

7 MR. O'CONNOR: That's fine, thank you.

8 MR. PETERSON: So as not to confuse matters, perhaps
9 I could ask Mr. Carlton a couple of redirect questions, so
10 that we try not to break it up too much.

11 MR. O'CONNOR: I'm sorry.

12 THE COURT: All right.

13 REDIRECT EXAMINATION

14 MR. PETERSON:

15 Q Mr. Carlton, if you know, do you know why there were
16 no restrictions set in Judge Murphy's case?

17 A No, I don't.

18 Q Were you provided a permanent address by Mr. Martin
19 at some point during his supervision?

20 A There -- on the release form, there was an address in
21 Grand Rapids, Minnesota.

22 MR. PETERSON: No further questions.

23 THE COURT: All right, you are excused.

24 As long as you've got some documents --.

25 Mr. Powers, why don't you come up to the stand again

1 for a minute?

2 Keep in mind, Mr. O'Connor, the validity of the
3 search warrant and its execution is not at issue at this
4 stage of the proceedings.

5 MR. O'CONNOR: Yes, Your Honor.

6 MR. PETERSON: Your Honor, I have no objection to
7 defense counsel showing, to the witness, what is marked as
8 Defense Exhibit 1.

9 I do have some problems with regard to Exhibits 2 and
10 3, but perhaps the best way to proceed would be simply to
11 let counsel ask the questions, and I can make the
12 objections at the appropriate time.

13 THE COURT: All right.

14 WALT POWERS

15 Being previously sworn, testified further as follows:

16 CROSS EXAMINATION (Cont.)

17 MR. O'CONNOR:

18 Q Mr. Powers, you made reference, a moment ago, to the
19 Physician's Desk Reference, otherwise known as the PDR.

20 Have I put in front of you the 1983 edition of the
21 PDR?

22 MR. PETERSON: Objection, lack of foundation.

23 THE COURT: Overruled.

24 MR. O'CONNOR:

25 Q That is what you made reference to before, isn't it?

1 A I don't know if it was this particular edition, but
2 it was the Physicians Desk Reference that I did refer to
3 earlier.

4 Q Now if I understand what you said, what you indicated
5 was that a chemist with the City of Minneapolis apparently
6 looked at the pills and -- without doing any other
7 testing -- determined that they matched the picture in the
8 PDR.

9 Is that a fair statement?

10 A Well, the chemist and myself and several other
11 individuals looked in the PDR and compared them; but
12 that's right.

13 Q Okay. I'm showing you what has been marked as
14 Defendant Exhibit 1. Would you agree that this is page
15 409, 865 and 866 of the 1983 edition of the PDR?

16 A Okay, the first page is a photocopy of page 409; the
17 second page is a photocopy of page 865; and the third
18 page is a copy of 866.

19 Q Okay, thank you. And you would agree with me,
20 wouldn't you, that those are the sections in the PDR that
21 deal with the particular drug that you believe was seized
22 from the defendant, Mr. Martin?

23 A That's correct.

24 MR. O'CONNOR: I offer Exhibit 1.

25 MR. PETERSON: Your Honor, I will object to the

1 introduction of Exhibit 1 to the extent defense counsel is
2 using it to fully define the characteristics of Ritalin.

3 The reasons for placing Ritalin, or any drug, on the
4 controlled-substance list are not necessarily confined to
5 the characteristics described in the PDR.

6 As a result, the government would object to the
7 introduction of Exhibit 1 for the purposes of this
8 proceeding.

9 THE COURT: Well, I will overrule the objection and
10 receive it, just for the purposes of what it says in the
11 Desk Reference. It is widely used in the legal
12 profession.

13 However, the court is aware that the statute
14 ultimately decides what is a controlled substance and what
15 isn't.

16 (Defendant Exh. 1 received)

17 MR. O'CONNOR:

18 Q Mr. Powers, are you familiar with the schedules of
19 drugs in 21 United States Code, Section 812?

20 A I have seen them --

21 Q Yes.

22 A -- but I don't know them by heart.

23 Q Are you familiar with Exhibit 3, which is 21 United
24 States Code, Section 841(a)?

25 MR. PETERSON: Your Honor, I object to this line of

1 questioning.

2 I believe all these questions are calling for legal
3 conclusions and asking the witness questions concerning
4 legislation -- which the Court is well aware of and can
5 take judicial notice of.

6 MR. O'CONNOR: That's fine by me, Your Honor, if you
7 will take judicial notice of the statute and the schedule.

8 THE COURT: I will take judicial notice of the
9 statute and schedule.

10 MR. O'CONNOR: Thank you.

11 Then I offer Exhibits 2 and 3 for that basis.

12 THE COURT: What is the purpose of the line of
13 questioning?

14 MR. O'CONNOR: Your Honor, I promise that within a
15 minute you will understand the purpose of the questioning,
16 which is --

17 THE COURT: Okay; I'm just pointing out -- as you I
18 am sure are aware -- the government does not have to prove
19 that the drugs found were actually a controlled substance.

20 MR. O'CONNOR:

21 Q Okay, showing you what's been marked as Exhibit 4,
22 this I am sure we can concede and stipulate is the
23 Complaint and, the Summons and Complaint in this
24 particular case, which charges the defendant with
25 possession of a Schedule 2 drug.

1 Would you agree with me?

2 MR. PETERSON: Your Honor, I object to this line of
3 questioning with this witness.

4 I don't mind if counsel would like the court to take
5 judicial notice of the arrest warrant and complaint filed
6 in this case. I believe the Court can do that in any
7 event.

8 But I do object to using this witness to ask
9 questions, which really are questions which should be
10 directed to the Court during argument.

11 MR. O'CONNOR: Your Honor, this is the witness who
12 has identified my client as being in possession of the
13 drugs for which he is charged in the Complaint.

14 THE COURT: All he says is that the drugs he looked
15 at and the chemist looked at, they thought were the drug
16 Ritalin.

17 He does not have to prove it was the drug. All the
18 government has to show is that there is probable cause to
19 believe that it was a controlled substance. It may not
20 even be the correct drug.

21 That doesn't mean he can't be bound over for the
22 purposes of this hearing.

23 MR. O'CONNOR: Well, Your Honor, it seems to me that
24 the purpose of this hearing is to determine whether or not
25 there is probable cause to hold my client and bind him

1 over, for the Grand Jury to determine whether a crime has
2 occurred and he's done it.

3 He's been charged with possession of a Schedule 2
4 drug.

5 We've identified, through this witness and through
6 the PDR, what Ritalin is -- and it is not a Schedule 2
7 drug under the statute.

8 THE COURT: Then I assume that, if he is indicted,
9 the indictment will be subject to a motion to dismiss.

10 MR. O'CONNOR: But it seems to me that the purpose of
11 this hearing is to determine, with respect to this
12 particular Complaint, whether there is probable cause to
13 bind him over for what he's charged with.

14 And there isn't probable cause to bind him over for a
15 Schedule 2 drug that does not arise and is not articulated
16 in Schedule 2.

17 It seems the thing to do is to recharge with what in
18 fact he has possessed -- if anything.

19 So there isn't probable cause for this possession.

20 THE COURT: But such an argument is properly
21 addressed to the court, as would the exhibits.

22 But questioning the witness about it certainly isn't
23 going to accomplish anything.

24 MR. O'CONNOR: Well, I wanted to get it through the
25 witness who has identified the drug as Ritalin; that's

1 why I did it through this witness.

2 But I'm done with him, anyway. And I offer Exhibits
3 1 through 4.

4 MR. PETERSON: Your Honor, I will object to the
5 introduction of Exhibits 2 and 3. Those are simply -- as
6 I understand it -- photocopies of legislation.

7 I will take counsel at his word, that they are
8 photocopies of the current legislation which is in effect,
9 after the various amendments that have been made to the
10 Anti-Drug Abuse Act.

11 But I would still pursue my objection, that that
12 legislation is more appropriately left for the Court, and
13 not for the introduction of exhibits.

14 THE COURT: Well, ultimately he is making the
15 argument; and whether I look at these, or go back and look
16 at the USC in my chambers, it's not going to make any
17 difference.

18 But you are excused in any event.

19 MR. O'CONNOR: Thank you, Judge.

20 THE COURT: I suppose -- I will receive all the
21 exhibits because there would be no prejudice.

22 (Def't. Exhs. 1-4, incl., received)

23 But I have to look at the statute, anyway, to make
24 sure this is the most current copy.

25 MR. PETERSON: Very well.

1 Your Honor, the government has one more witness,
2 Sergeant Gordy Haertel.

3 GORDON HAERTEL

4 Being duly sworn, testified as follows:

5 DIRECT EXAMINATION

6 THE CLERK: State your name and spell your last name.

7 A My name is Gordon Haertel, H-a-e-r-t-e-l.

8 MR. PETERSON:

9 Q What do you do for a living, Mr. Haertel?

10 A Police officer in the City of Minneapolis.

11 Q Briefly, what are your current duties?

12 A I am an investigator with the department.

13 Q Have you had occasion to conduct an investigation of
14 Terry Jon Martin?

15 A Yes sir, I have.

16 Q Why did you conduct that investigation?

17 A We had received information that he was involved in
18 criminal activity.

19 Q What type of a criminal activity?

20 A Burglaries, selling narcotics, shoplifting. We had
21 one report on fencing, but that was a minor --

22 MR. O'CONNOR: Your Honor, I can't hear.

23 THE COURT: Okay, try to speak a little louder.

24 A Okay.

25 MR. PETERSON:

1 Q When did you receive that information?

2 A It's -- we started receiving the information in the
3 Spring of 1986, and that continued all the way through
4 until just recently.

5 Q Last Fall, did you have occasion to make some
6 inquiries regarding Mr. Martin?

7 A Yes, I did (nods head in an affirmative manner).

8 Q When did you make those inquiries, exactly?

9 A It was approximately in the middle of November.

10 Q And why did you initiate those inquiries?

11 A I understood that he was out on bail and that he had
12 received instructions that his place of residence was
13 supposed to be Grand Rapids, Minnesota.

14 We had received information in our office that he was
15 an active drugstore burglar; and, also, that he was
16 selling narcotics and working with a partner out-state
17 Minnesota and out-of-state Minnesota; and, also, that he
18 was staying in a hotel in Minneapolis, rather in his
19 designated residence in Grand Rapids.

20 Q How did you receive that information, regarding the
21 hotel stay?

22 A Through the FBI.

23 Q And how did they receive that information?

24 A I believe it was through an informant -- but I am not
25 sure.

1 Q And what did you do after receiving that report?

2 A Special Agent Al Ness, with the FBI, and I went to --
3 I believe it was -- the Oak Grove Apartments,
4 approximately two blocks west of Nicollet on Oak Grove,
5 and asked the clerk there -- I believe it was a Mr.
6 Northon(phonetic) -- asked him if he had a Terry Martin
7 living in the hotel.

8 He said he thought he did.

9 He started going through his files, and hesitated,
10 and said that he didn't, he couldn't remember anyone by
11 that name for sure.

12 And I showed him a mug shot of Terry Martin, and he
13 identified Martin as Terry King, and showed us his
14 application for a room in that hotel.

15 Q Did he tell you anything else about Mr. King, also
16 known as Mr. Martin?

17 A Yes.

18 Q What did he say?

19 A He said that he kept very unusual hours.

20 He was gone two, three days at a time, usually came
21 in around 3:00, 4:00 o'clock in the morning, and that he
22 had been --

23 Q Have you received any other information regarding
24 other residences occupied by Mr. Martin?

25 A Yes sir, I have.

1 Q From whom did you receive that information?

2 A From the Minneapolis Narcotics Department and, also,
3 the Hennepin County Narcotics Division.

4 Q What information have you received?

5 A That Mr. Martin was living with a known narcotics
6 dealer in south Minneapolis.

7 Q And when did you receive that information?

8 A That was in the Fall of 1986, and that continued all
9 the way through until -- it was April of this year, I
10 think.

11 MR. PETERSON: No further questions.

12 CROSS EXAMINATION

13 MR. O'CONNOR:

14 Q Mr. Haertel, do you know what the conditions of Mr.
15 Martin's release were, with respect to the state case that
16 is presently pending?

17 A No sir.

18 Q Do you know if he is on bail or not?

19 A No sir.

20 Q Is it fair to say that you have taken no steps -- as
21 far back as the Spring of 1986, or late in the Fall of
22 '87 -- to attempt to revoke any bail that he is presently
23 out on, with respect to his Hennepin County case?

24 True or false?

25 A That is not true.

1 I've told everyone in the system, believing this bail
2 hearing would come up.

3 Q So you have talked to people?

4 A Yes sir.

5 Q So you in fact know that he is on bail?

6 A You asked if I knew the conditions.

7 I don't know the conditions.

8 Q But you know in fact that he's been released?

9 A Yes sir.

10 Q And so with respect to -- at one end of the
11 spectrum -- detention without bail, we know that that is
12 not one of the conditions of his release in Hennepin
13 County.

14 True?

15 A Yes sir.

16 MR. O'CONNOR: I have nothing further.

17 MR. PETERSON: No further questions.

18 THE COURT: You are excused.

19 Any other witnesses, Mr. Peterson?

20 MR. PETERSON: None, Your Honor.

21 MR. O'CONNOR: No witnesses, Your Honor.

22 THE COURT: All right.

23 And I take it that is the entire submission, both on
24 the preliminary hearing and on the detention?

25 MR. PETERSON: It is, Your Honor.

1 THE COURT: All right.

2 At least as to Count 2, I find there is probable
3 cause to believe that the defendant committed an offense
4 while on appeal, that he did commit a felony while on
5 release pending an appeal, in violation of 18 USC 3147 1;
6 and I order -- as to that count -- he be held for further
7 action by the United States Grand Jury.

8 As to Count 1 involving the Ritalin, I thought we
9 would take a short recess so the statutes can be checked,
10 and determine whether or not Ritalin is or is not a
11 Schedule 2 controlled substance.

12 Why don't we take -- it's 10 after 3:00. Why don't
13 we take a recess until 3:30, and that will give you -- Mr.
14 Peterson -- a chance to run downstairs, also, and see what
15 you can come up with.

16 MR. PETERSON: Okay.

17 THE COURT: And then we will resume at 3:30 and make
18 a decision on Count 1 and on bail.

19 All right.

20 MR. PETERSON: Very well, Your Honor.

21 (Recess)

22 THE COURT: Well, I think I found the answer.

23 I assume Mr. Peterson has.

24 It appears to me that Ritalin is a Schedule 3 -- not
25 a Schedule 2 -- drug; which would mean the sentence,

1 instead of being 15, would be 5 years.

2 Is that what you have come up with, Mr. Peterson?

3 MR. PETERSON: Well, Your Honor, I agree with the
4 court that the provisions of the Criminal Code, which I
5 have, would indicate that it is a Schedule 3 drug.

6 However, I have a witness from the DEA who is
7 familiar with Ritalin and is prepared to testify that it
8 has been classified a Schedule 2 drug substance.

9 It is somewhat unclear as to whether or not -- as of
10 this moment -- it is a Schedule 2 or Schedule 3; but at
11 least this witness would be able to confirm that it is
12 indeed a controlled substance and -- as far as the
13 information that she has -- that it is a Schedule 2
14 controlled drug substance.

15 THE COURT: Well, I have looked at the most recent
16 section of the statute and --

17 MR. PETERSON: Your Honor --

18 THE COURT: -- under Schedule 3, Methylphenidate is
19 scheduled. And that is the chemical name for Ritalin.
20 And the statute says it is Schedule 3.

21 And I don't see how I can even take testimony from
22 the agent, if it is going to be contrary to the statute.

23 MR. PETERSON: I have no other information regarding
24 legislation that would contradict that, Your Honor --

25 THE COURT: Although I do believe that -- we are not

1 dealing with an indictment here.

2 I would expect the government could move to amend the
3 Complaint as to Count 1.

4 MR. PETERSON: Your Honor, I certainly would move to
5 amend the Complaint to conform to the information which
6 the Court has uncovered.

7 And, also, I would argue that that amendment perhaps
8 may not even be necessary at this stage, in light of the
9 fact that the Court is presented with a question of
10 whether or not there is probable cause to hold the
11 defendant -- and not to determine whether or not this case
12 should proceed to trial on the charges which are currently
13 listed in the criminal Complaint.

14 THE COURT: All right. Then you move to amend Count
15 1 to read a Schedule 3 controlled substance, instead of a
16 Schedule 2 controlled substance?

17 MR. PETERSON: I do, Your Honor.

18 THE COURT: That will be granted.

19 But I have another question now, as to Count 2 --
20 which I have already said the defendant would be bound
21 over for.

22 Has the deendant been convicted of any of these
23 offenses that allegedly occurred while he was on release?

24 Or is he just charged in Hennepin County and/or other
25 counties?

1 MR. PETERSON: It is my understanding he is charged,
2 but not yet convicted.

3 THE COURT: Okay. Because I looked at Section 3147
4 of Title 18, which is the Count 2 charge, and that reads,
5 "a person convicted of an offense committed while released
6 pursuant to this chapter, shall be sentenced in addition
7 to the sentence described.

8 So it would appear to me that Count 2 is premature.

9 And I had not read that section before.

10 And I know that we routinely advise prisoners, before
11 they go out on bond, that if they commit a felony while
12 they are on release, they could be subject to a
13 consecutive separate sentence.

14 But it would appear that, in order for 3147 to apply,
15 a person would have to be convicted.

16 MR. PETERSON: That is how I would read that statute
17 as well, Your Honor.

18 THE COURT: And Count 2 itself reads "committed an
19 offense."

20 It doesn't state "convicted of an offense."

21 But I suspect that that count cannot stand.

22 So what I am going to do -- I am going to dismiss
23 Count 2 because it charges an offense that has not
24 occurred.

25 I am going to bind over on Count 1, as amended,

1 alleging that the defendant possessed, with intent to
2 distribute, 800 dosage units of Ritalin, a Schedule 3
3 controlled substance -- hold on; we may have some new
4 information.

5 (The law clerk presents the Court with a paper
6 writing)

7 THE COURT: All right, we can go back to the drawing
8 board. 21 CFR 1308.04 -- which is probably what the agent
9 was going to cite to us, if I had let her take the
10 stand -- lists changes in controlled substances.

11 And under Schedule 2 -- which is 21 USC 1308.12 -- it
12 lists Methylphenidate as a Schedule 2 controlled
13 substance.

14 So I suppose the thing to do now is to vacate the
15 amendment to Count 1; and Count 1 shall remain charging a
16 Scheduled 2 controlled substance.

17 And as to Count 1, I find that there is probable
18 cause to believe that the defendant, Terry Jon Martin, did
19 in fact possess 800 dosage units of Ritalin, a Schedule 2
20 controlled substance, in violation of the statute.

21 I will order that he be held for further action by
22 the United States Grand Jury on Count 1.

23 Yes, Mr. Peterson?

24 MR. PETERSON: Your Honor, before we conclude the
25 hearing, perhaps I could raise another issue with regard

1 to Count 2.

2 THE COURT: All right.

3 MR. PETERSON: It is true that Section 3147 of Title
4 18 refers to a conviction. But, at the same time, it
5 seems to this prosecutor that Section 3147 is intended to
6 be a sentencing enhancement provision; and it may well be
7 appropriate to charge that as part of the Count 1 offense
8 that is before the Court, so that the Court would have the
9 full sentencing authority that Congress had intended --
10 not only for the underlying offense charged in Count 1,
11 but also for the enhancement which would be allowed by way
12 of Title 18, Section 3147.

13 And so, until the United States would be allowed to
14 do some additional research on that question, I would like
15 the record to reflect that it would be our position that
16 that count should not be dismissed at this stage.

17 THE COURT: It looks like Count 2 does not really
18 charge a crime. It just gives the trial court an
19 enhancement sentence if -- at the time of conviction --
20 the defendant will in fact have been convicted of another
21 crime that occurred while he was on release.

22 Mr. O'Connor?

23 MR. O'CONNOR: Well, Your Honor, to the extent that
24 it is alleged in this Complain that my client has violated
25 Section 3147 of 18 USC, I think we can all agree that

1 there is not probable cause to believe that a violation of
2 3147 has occurred.

3 If so, that count should be dismissed.

4 If it is a sentencing enhancement provision, it can
5 be raised somewhere down the line.

6 THE COURT: I agree, and at this point, even if it
7 were wordless and the defendant were charged, he couldn't
8 receive the enhanced sentence in any event because at this
9 stage he has not been convicted, so it is really
10 surplusage at this stage.

11 So I will dismiss Count 2, as I said I would; and if
12 the defendant is convicted on Count 1 and -- before
13 sentencing -- he is convicted on one of these other
14 offenses, then the sentencing enhancement provisions of
15 3147 will come into play.

16 MR. O'CONNOR: Your Honor, may I also be heard with
17 respect to what you have done on Count 1?

18 I would just like it to be clear that we are taking
19 the position that 21 USC Section 812, at the time --

20 THE COURT: That is 21 Code of Federal Regulations.

21 MR. O'CONNOR: Well, I understand, Your Honor, that
22 you have looked at the CFR to determine what Ritalin is --
23 whether it is a Schedule 2 or Schedule 3 drug -- and it is
24 our position that what is in the United States Code,
25 labeled as a Schedule 2 or 3 drug, is what controls; and

1 not the CFR.

2 So that to the extent that, at the time of the
3 commission of the offense, what was listed as a Schedule 2
4 drug -- or a Schedule 3 drug; excuse me -- in United
5 States Code, is what ought to control; and not the CFR.

6 THE COURT: Well --

7 MR. O'CONNOR: And for what it's worth, also, Your
8 Honor, I don't believe that there has been a showing here
9 that it is Ritalin.

10 They have just seen a drug; they compared it to a
11 picture.

12 THE COURT: That is sufficient for probable cause.
13 He's a trained agent.

14 MR. O'CONNOR: The last thing, Your Honor, is:

15 If there is some question about whether it is a
16 Schedule 2 or Schedule 3 drug, and if a Schedule 3 drug
17 carries a penalty of 5 years, that would eliminate any
18 presumption -- under 1342 of the Bail Reform Act of
19 1984 -- that would have to be overcome.

20 Which makes it a sticky issue.

21 I think the fact is, though, that the government had
22 the obligation to establish that no conditions or
23 combination of conditions, under Section 1342, would
24 insure his appearance and would make you reasonably sure
25 that the community and particular witnesses were not in

1 danger.

2 So I don't believe that they have made a showing, in
3 any event.

4 But with respect to your ruling, on whether it is a
5 Schedule 2 or Schedule 3 drug, that could adversely affect
6 our position, because of what may or may not be a
7 presumption. If you were not going to detain anyway, then
8 that's moot; but if you were going to detain and determine
9 that we failed to overcome that presumption, thi issue
10 will come back to haunt us.

11 MR. PETERSON: Your Honor, in defense of the Court's
12 ruling: It is specifically provided in Title 21, Section
13 811, that there is authority for the attorney general to
14 reclassify or classify various controlled substances.

15 And I presume that it is by that statutory mandate
16 that the regulations were promulgated, and that it is
17 entirely proper for the Court -- and, indeed, required by
18 the Court -- to follow the schedule designated in the most
19 recent Code of Federal Regulations provision; rather than
20 simply what was originally mandated by Congress in the
21 list provided in Section 812 of Title 21.

22 THE COURT: I agree with that, Mr. Peterson.

23 MR. O'CONNOR: May I also, just for the record --
24 before you rule on our detention hearing -- I would like
25 to state that it is our position that, (a), the government

1 has not established by clear and convincing evidence that
2 its motion should be granted and that Mr. Martin should be
3 held without bail; (b), that the statute as applied, if
4 Mr. Martin is detained without bail, would be
5 unconstitutional under the Eighth Amendment as excessive
6 bail, and that the statute as applied to Mr. Martin would
7 violate his Fifth Amendment due process -- both
8 substantive and procedural -- due process rights, if he
9 were held without bail; and, finally, the fact that he has
10 always appeared at every hearing and that the United
11 States Government had an option in two cases to prevent
12 him from being out on bail and failed to do that -- and
13 likewise Hennepin County has done the same thing -- all
14 indicates that he's not going to flee the jurisdiction.

15 He does have employment periodically, can find
16 employment, is a carpenter.

17 He lives with his brother in Grand Rapids.

18 So all these conditions that are in Section C of
19 1342 -- that you can restrict where he can live, he can
20 put up a bail bond, there are ways to be reasonably
21 assured that he will not be a danger to persons or
22 society -- all of which have not been eliminated by
23 anything that Mr. Peterson has put on the stand.

24 He hasn't even addressed the issue of whether any of
25 these conditions of release can reasonably assure the

1 court.

2 So I believe that he hasn't made the showing in any
3 event.

4 That's our position.

5 THE COURT: Mr. Peterson?

6 MR. PETERSON: The only thing I would add, Your
7 Honor, is to confirm that it is the government's position
8 that we are concerned, not only with the risk of flight,
9 but also the danger to the community if Mr. Martin were
10 released.

11 It is on those dual grounds that we would ask the
12 court to detain this particular defendant.

13 THE COURT: Well, the risk of flight is one thing,
14 and I agree that it appears the defendant has made past
15 court appearances.

16 Looking at his background, I think that there is a
17 possibility of continuing violations, if he were to be
18 released.

19 But I am going to set bail. I am going to set bail
20 in the amount of \$10,000 cash or surety.

21 A condition of the bail will be that the defendant
22 not use or possess any controlled substances or abuse
23 alcohol while he is on release; that he not leave the
24 District of Minnesota without prior approval of the court;
25 and that he report in person to the Minneapolis office of

1 the probation office, every weekday morning before 9:00
2 o'clock a.m.

3 MR. O'CONNOR: So you are assuming, Your Honor, that
4 he will not live in Grand Rapids?

5 THE COURT: Well, the testimony indicated he was able
6 to find an apartment here and was living here at the time
7 of his arrest.

8 Is that correct, Mr. Peterson?

9 MR. PETERSON: It is, Your Honor.

10 THE COURT: All right.

11 It may very well be that there's not sufficient
12 reporting facilities to stay up in Grand Rapids, and it
13 appears he was living down here, anyway.

14 So I will do a bond order with those conditions.

15 And I should stress to you again, Mr. Martin, that
16 if -- while on release -- you fail to appear, you could
17 receive a separate sentence of 5 years in prison and a
18 \$250,000 fine or both, just for failing to appear. That
19 would be a consecutive sentence; which means you wouldn't
20 even start doing that time until after you have completed
21 whatever sentence you might get if you are convicted of
22 these charges.

23 You should know that, if you commit a felony while
24 you are on release -- which is one of the things which is
25 raised in this Complaint -- you could receive a separate

1 sentence of two to ten years in prison, and that would be
2 a consecutive sentence.

3 If you commit a misdemeanor while you are on release,
4 you could receive a separate sentence of 90 days to one
5 year in prison, and that would be a consecutive sentence.

6 If you attempt to intimidate any witnesses or jurors
7 or court officers while you are on release, you could
8 receive a separate sentence of five years in prison, or a
9 \$5,000 fine, or both.

10 If you attempt to obstruct a criminal investigation
11 by bribing some person not to give information to an
12 investigator, you could receive a separate sentence of
13 five years in prison or a \$5,000 fine, or both.

14 If you attempt to tamper with any witness or victim
15 or informant, you could receive a separate sentence of ten
16 years in prison, or a \$250,000 fine, or both.

17 If you attempt to retaliate against any witness or
18 victim or informant, you could receive a separate sentence
19 of ten years in prison, or a \$250,000 fine, or both.

20 Do you understand that?

21 THE DEFENDANT: Yes, Your Honor.

22 THE COURT: All right two other conditions of release
23 will be that you do not commit any felonies or
24 misdemeanors -- I'll make that you not even be arrested
25 for any felonies or misdemeanors; and if you are, or if

1 you violate any of those other conditions of release, the
2 bail will be forfeited , it will be vacated and forfeited,
3 and I'll order you be held without bond until the trial.

4 Do you understand that?

5 THE DEFENDANT: Yes, YOur Honor.

6 THE COURT: All right.

7 Anything further?

8 MR. PETERSON: Nothing, Your Honor.

9 THE COURT: All right, thank you.

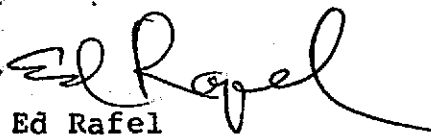
10 MR. O'CONNOR: Thank you.

11 (Proceedings closed)

12 CERTIFICATE

13 Certified a correct transcript of my notes taken in the
14 above entitled matter at the time and place hereinbefore
15 indicated.

16 Date: July 1, 1987

17 
18 Ed Rafel

19 U. S. District Court Reporter
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